HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2) (b)

Description of the Case.

Criminal Appeal No. 781 of 2001
1828 of 1991 (Old No.)

Madan Lal and two others. … Appellants

Versus

State … Respondent

~~Approved for reporting.~~

_____

Not approved for reporting.

Date of decision 1st October 2004.

Initial of Judge.

_____

_____

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Reserved

Criminal Appeal No. 781 of 2001
1828 of 1991 (Old No.)

1. Madan Lal S/o Sri Nand Lal
2. Jai Lal S/o Nand Lal
3. Birendra Lal S/o Sri Akaloo
   All R/o village Dilgul, Kameda,
   Patwari Kshetra Rudra Prayag,
   District-Chamoli. … Appellants

Versus

State … Respondent

Sri Raman Kumar Shah, Amicus Curiae/learned counsel for the appellants
Sri H.C. Pandey, learned Addl. G.A. for the State

Coram:- Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon'ble B.C. Kandpal, J.)

Present appeal has been filed by the appellants against the judgment and order dated 26.06.1991 passed by the Sessions Judge, Chamoli in S.T. No. 10 of 1991 State Vs. Madan Lal & others convicting the appellants under Sections 120-B/302/34 I.P.C. as well as under Sections 394/397 I.P.C. and sentencing them for life imprisonment and further sentencing thereon for 10 years R.I. respectively.

Brief facts giving rise to the appeal are that a First Information Report was lodged by Bihari Lal on 25.10.1990 at 9:00A.M. at Patwari Circle Rudraprayag stating therein that his son Subhash aged about 9 years had gone to the house of his Grand Mother - Gadoli Devi on 23.10.1990 in the morning and thereafter did not return to his house. The informant Bihari Lal when started searching his son on 25.10.1990 then at the house

of Smt. Gadoli Devi he found that the bodies of Smt. Gadoli Devi and Subhash were lying dead on the nearby field adjacent to the house of Nathu Lal. Nathu Lal is the husband of the deceased Smt. Gadoli Devi.

A complaint under Section 156 (3) of the Criminal Procedure Code was also filed by Nathu Lal - husband of the deceased Smt. Gadoli Devi against the accused/appellants before the Court of C.J.M., Chamoli. The learned C.J.M. directed the matter to investigate and thereafter lodge the report accordingly.

Inquest on the dead bodies of Smt. Gadoli Devi as well as Subhash were prepared and thereafter the bodies were sent for autopsy.

The post mortem on the bodies of the deceased Smt. Gadoli Devi and Subhash were conducted on 26.10.1990 at 1:45P.M. and 3:00P.M. respectively. Dr. S.D. Uniyal (P.W.6) found 9 incised wounds on the different parts of the body of Smt. Gadoli Devi. Doctor also found 6 incised wounds and 2 abrasions on different parts of the body of the deceased Subhash. The doctor also opined that the death was caused due to shock and haemorrhage. Doctor also opined that the death of both the deceased could have been caused by the same and one weapon. He also opined that the death of the deceased could have been occurred on 23.10.1990.

The case of the aforesaid double murder was investigated by Jai Bir Singh Rawat (P.W.9) who recorded the statements of the witnesses, prepared the site plan and thereafter recovered the blood sustained Thamali (sharp edged weapon used in the crime) from the field of Nathu Lal on 08.11.1990. The Investigating Officer prepared the memo accordingly as well as

the site plan pertaining to the place from where the aforesaid arm was recovered.

The Investigating Officer also applied from the statement of one of the witnesses Raghubeer Singh to be recorded under Section 164 Cr.P.C. The statement of Raghubeer Singh was accordingly recorded by the S.D.M. - Ashok Kumar (P.W.7).

The Investigating Officer after completing the investigation submitted the chargesheet against the accused/appellants before the court of C.J.M., Chamoli.

After submission of the chargesheet the appellants were committed to the court of Sessions and the learned Sessions Judge framed the charges against the accused under Sections 120-B/302/34 I.P.C. as well as under Sections 394/34 I.P.C.

The accused/appellants denied of the charges levelled against them and claimed their trial.

The prosecution in order to bring the guilt of the appellants to home, produced Bihari Lal – P.W.1, Nathu Lal – P.W.2, Kushma Devi P.W.3, Govind Lal P.W.4, Roopsna Lal P.W.5, Dr. S.D. Uniyal – P.W. 6, Sri Ashok Kumar (S.D.M.) – P.W. 7, Jatni Lal P.W. 8 and Jaibeer Singh Rawat – P.W. 9.

After the evidence of the prosecution was over, the statements of the accused were recorded under Section 313 Cr.P.C. The appellants did not adduce any evidence in their defence.

Learned trial court, after having perused the entire evidence on record and hearing the learned counsel for the parties, convicted the accused/appellants under Sections 120-B/302/34 I.P.C. and sentenced them for life imprisonment.

Learned trial court further convicted the appellants under Sections 394 and 397 I.P.C. and sentence them to 10 years R.I. vide judgment and order dated 26.06.1991.

Feeling aggrieved by the aforesaid impugned judgment and order the accused/appellants preferred appeal before the Hon'ble Allahabad High Court, which has been transferred to this Court, for disposal, after creation of Uttaranchal State.

We have heard learned counsel for the parties and perused the record.

As per the prosecution case, the appellants are alleged to have murdered Smt. Gadoli Devi and Subhash in the night of 23.10.1990. The evidence adduced by the prosecution shows that Bihari Lal (P.W.1), Nathu Lal (P.W.2), Govind Lal (P.W.4) and Roopsa Lal (P.W.5) have deposed in their evidence that there was some quarrel between the appellants and Nathu Lal husband of the deceased Smt. Gadoli Devi. It has been deposed by the aforesaid witnesses that Madan Lal one of the appellants had borrowed Rs. 200/- from Nathu Lal and on demand of that money by Nathu Lal, the appellant Madan Lal denied to reply him. On this, there was some altercation between Nathu Lal and the appellant Madan Lal and the appellant also threatened Nathu Lal with dire consequence.

On the basis of above evidence, the prosecution has tried to suggest the motive available to the appellants for committing this gruesome crime.

The case certainly rests on circumstantial evidence as there is no direct evidence available pertaining to the actual incident of murder.

Nathu Lal (P.W.2) has deposed that prior to the murder of Smt. Gadoli Devi and Subhash, there was a quarrel between

the appellant Madan Lal, Jai Lal and himself. In this quarrel Madan Lal and Jai Lal tried to assault him and this quarrel arose on account of the money demanded by him.

The motive suggested by the prosecution appears to be quite weal. It does not appeal to reason that anybody will commit a gruesome murder of two persons only for the sake of Rs.200/-. The dispute is not with regard to the property or with regard to and big stake. Whatever the quarrel was there, the same was between Nathu Lal husband of the deceased Smt. Gaduli Devi and the appellant Madan Lal. However, if the prosecution has suggested the motive then the prosecution again will have to complete the chain of the circumstances, which may point out the guilt of the appellants and none else as the motive in a criminal case does not play any important role but in case, if other evidence and the circumstances of the case are so closely connected and linked with each other then the motive will certainly be an important factor in order to bring the guilt of the appellants to home.

However, we assess the other evidence available on record in order to find the truth and reach to a definite conclusion whether the murders have actually been committed by the appellants or not.

Bihari Lal (P.W.1) is the father of the deceased Subhash and as per his own statement, he was not present in his house in the night of 23.10.1990. He has deposed that on 21.10.1990 he had gone out of his village and when he came back to his village on 23.10.1990 in the noon then immediately his uncle Dhani Lal took him to village Ratura and from there he came back to his house in the evening of 24.10.1990 and only thereafter he came to know of this incident.

Similarly, Nathu Lal (P.W.2) has also deposed in his evidence that he had gone to the house of Dhani Lal at village Ratura and he came back to his village on 25.10.1990. Hence, this witness was also not present in his house in the night of the incident.

The prosecution has further produced Govind Lal (P.W.4) and Roopsa Lal (P.W.5). These witnesses are also not the eyewitnesses and they have been produced by the prosecution on the point of the motive.

Again Jatni Lal (P.W.8) has been produced by the prosecution in order to show that his son Raghubir Lal had gone with the appellants on 23.10.1990 at about 8:00P.M. and when he asked his son and the appellants as to where they had been going then they told him that they were going to see *'Jhumela dance.'* This witness has further deposed that on the next morning his son had gone to his job and did not meet him. But in the cross examination he has deposed that he met his son on the next morning at 8:00A.M. and his son told him that Smt. Gadoli Devi and Subhash were murdered.

Perusal of the statement of this witness does not anywhere indicate that Raghubir Lal told his father Jatni Lal (P.W.8) that Smt. Gadoli Devi and Subhash were in fact murdered by the appellants. Therefore, considering the facts available on the record it appears to be quite clear that there is no evidence adduced by the prosecution which may suggest that any of the prosecution witnesses had actually an occasion to see the actual incident of murder of Smt. Gadoli Devi and Subhash. As we have already discussed above that when the direct evidence is not available pertaining to the murder of Smt. Gadoli Devi and Subhash, then the burdens lies on the shoulder

of the prosecution to prove the guilt of the accused/appellants by way of cogent and reliable circumstantial evidence and the chain of the circumstances should be so initial that it should point out towards the guilt of the appellants and none else.

Another circumstance which has been adduced by the prosecution in the present case is which regard to the last seen of the accused/appellants.

The prosecution has produced Kushma Devi (P.W.3) on the point of last seen. This witness has deposed in her evidence before the court that she saw the appellants Madan Lal, Birendra Lal and one another person 'Raghu' at the shop of the appellant Jai Lal in the evening of 23.10.1990 and subsequently she saw appellants Madan Lal, Jai Lal and Birendra Lal in the night going on the way which leads to the house of the deceased Smt. Gadoli Devi. She has deposed that "*घटना के रात, उस रास्ते पर, कुत्ते भौंक रहे थे। तब मैं बाहर आई। मैने देखा, मदन लाल, जय लाल, बीरेन्द्र लाल, जो उस रास्ते पर, गदोली देवी के घर से वापस आते हुए देखा।*"

Again the deposition of this witness does not anywhere indicate that she had actually seen appellants entering inside or coming out of the house of Smt. Gadoli Devi. The place of occurrence is a village. The witness had seen the appellants on the pathway which leads to the house of Smt. Gadoli Devi. This type of last seen does not conclusively prove the guilt of the accused/appellants. If a pathway incidentally leads towards the house of the deceased Smt. Gadoli Devi then it cannot be concluded only on the basis of this fact that the appellants were going to the house of Gadoli Devi.

Therefore, the evidence adduced by the prosecution with regard to the last seen also does not inspire any confidence.

Another important factor in this case is the evidence of Raghubir Lal. The prosecution has not produced this witness before the court but got recorded his statement under Section 164 Cr.P.C. before the Executive Magistrate. This deposition of the Investigating Officer shows that he recorded the statement of Raghubir Lal S/o Sri Jatni Lal (P.W.8) under Section 161 Cr.P.C. on 17.11.1990 and thereafter the statement of this witness Raghubir Lal was recorded by the Executive Magistrate under Section 164 Cr.P.C.

The prosecution has vehemently stresses and placed reliance on the statement of this witness Raghubir Lal recorded under Section 164 Cr.P.C., who in his statement, has deposed that the appellants Madan Lal, Jai Lal and Birendra Lal had murdered Smt. Gadoli Devi and Subhash with '*Thamali*' and thereafter, these appellants removed the Jewellery from the person of Smt. Gadoli Devi.

It is important to mention here that this witness Raghubir Lal has not been produced by the prosecution before the court. The prosecution has tried to submit before the Court that Raghubir Lal might not be alive subsequently, therefore his attendance could not be procured by the prosecution in order to produce him before the court.

We fail to appreciate this argument advanced by the learned A.G.A.

The record does not anywhere indicate that the prosecution had seriously made any effort to trace out Raghubir Lal in order to produce him before the court. The statement recorded under Section 164 Cr.P.C. would be of no importance unless the person is produced before the court for his cross examination.

Ashok Kumar (S.D.M.) – (P.W.7) who has deposed in his statement before the court that Raghubir Lal was produced before him on 24.11.1990 and his statement was recorded under Section 164 Cr.P.C., who deposed in his statement that on 23.10.1990 he was sitting with Madan Lal and Birendra Lal in the shop of Jai Lal in the evening of 23.10.1990. The appellants said that kerosene oil was not available and in the night they will certainly steal the kerosene oil from some place. Thereafter, in the night Birendra Lal had come to Raghubir Lal and asked his father that they had been going to see '*Jhumela dance*'. Madan Lal and Jai Lal met Birendra Lal on the way and they also accompanied them. He further deposed in his statement before the Executive Magistrate that after a short distance, the appellant Madan Lal asked them that they all will go through Silari way and from there they will ask for a container. On this Raghubir Lal replied that there uncle was not available there, therefore, he will not go to his house for asking the container. Anyhow, these appellants alongwith Raghubir Lal went through Silari route and as soon as they reached the house of Nathu Lal then the appellant asked Raghubir Lal to knock the door and when Smt. Gadoli Devi opened the door then Madan Lal at the point of knife dragged her. Birendra Lal and Jai Lal overpowered her and thereafter they all took her to the nearby field and murdered her with Thamali. These appellants came again to the house and took Subhash who was sleeping inside the house of Smt. Gadoli Devi and he was also murdered by the appellants by that Thamali in the nearby field. The appellants thereafter, took out the Jewellery from the person of the deceased Smt. Gadoli Devi and threw the Thamali after committing the murder in a nearby field.

The statement of Raghubir Lal which is allegedly recorded under Section 164 Cr.P.C. firstly is not proved as he has not been produced by the prosecution for cross examination. Secondly, his statement under Section 164 Cr.P.C. does not find any corroboration with any other evidence available on the record. The statement of Raghubir Lal recorded under Section 164 Cr.P.C. cannot be said to be the dying declaration as has been argued by the learned counsel for the State.

The dying declaration is a statement written or verbal of relevant facts made by a person who is dead and the same is an important piece of evidence and the conviction can be based solely on the dying declaration. But in the instant case firstly the statement of Raghubir Lal cannot be termed as dying declaration, secondly, it is not known whether Raghubir Lal is still alive or dead.

Anyhow, the statement of Raghubir Lal does not come within the ambit of Section 32 of the Evidence Act and the same cannot be said to be dying declaration. The prosecution thus, has failed to produce any other cogent and reliable evidence which completes the chain of circumstance in this case in order to establish the guilt of the appellant.

The two circumstances as stated above shown by the prosecution in the present case appear to be quite weak.

The motive itself is very weak as well as the statement of the last seen of the appellants on the pathway in the night also does nto appear to be convicting. It is neither the case of the prosecution that the appellants were seen entering inside or coming out of the house of Smt. Gadoli Devi immediately before or after the occurrence, nor they were seen lastly in the

company of deceased. Therefore, both the circumstances shown by the prosecution before the court appear to be quite week and do not conclusively point out towards the guilt of the accused/appellants.

Other circumstance in the case is with regard to the recovery of the blood stained '*Thamali*' by which the murder of Smt. Gadoli Devi and Subhash is alleged to have been committed. This Thamali was recovered from the filed of Nathu Lal on 08.11.1990. The '*Thamali*' which is alleged to have used in the commission of crime is neither recovered on the pointing out of the appellants nor has been recovered from a place where it was kept concealed. '*Thamali*' was recovered from the open filed. Therefore, the manner in which the Thamali has been recovered by the Investigating Officer cannot be said to be a recovery under the provision of Section 27 of the Evidence Act.

An important factor which also goes against the prosecution is the delay in recording the statement of Raghubir Lal under Section 161 Cr.P.C.

The incident has taken place in the night on 23.10.1990 and no sufficient explanantion has been offered by the prosecution for recording the statement of this witness Raghubir Lal till 17.11.1990. The Investigating Officer Jaibeer Singh Rawat (P.W.9) has stated in his deposition that he could not record the statement of Raghubir Lal prior to 17.11.1990 as Raghubir Lal was not available in his house. He has further stated that after the statement recorded under Section 161 Cr.P.C. again whereabouts of Raghubir Lal are not known. Therefore, delay in recording the statement of Raghubir Lal by the Investigating Officer, creates and apprehension as to the

statement of Raghubir Lal has been shown in the case diary only to fill up the lacuna in the prosecution case.

The unusual feature which projects its shadow on the evidence adduced by the prosecution and casts a serious doubt about Raghubir Lal being an eyewitness of the occurrence is the undue delay on the part of the Investigating Officer in recording his statement. The statement of Jatni Lal (P.W.8) shows that he met with his son in the next morning at 8:00A.M. who disclosed him that Smt. Gadoli Devi and Subhash have been murdered. Statement of Jatni Lal (P.W.8) was recorded by the Investigating Officer on 10.11.1990. Therefore, under these circumstances why and how the statement of Raghubir Lal could be recorded upto 17.11.1990 casting serious doubt about Raghubir Lal being the eyewitnesses of the occurrence.

Delay of few hours or one or two days in recording the statements of eyewitnesses, may not be itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the Investigator was deliberately making time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exist in the instant case. Therefore, the delay in recording the statement of the material witness Raghubir Lal by the Investigating Officer, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.

The prosecution story, therefore, does not inspire confidence firstly, on the ground that Raghubir Lal a material witness has not been produced before the court secondly, his

statement itself was recorded by the Investigating Officer after a long delay.

The prosecution has come up with the case with regard to the fact that after the murder of Smt. Gadoli Devi, the appellants removed her Jewellery and ornaments from her person. This fact further does not find any corroboration with the evidence adduced by the prosecution. No recital made in the First Information Report in this regard. The First Information Report lodged by Bihari Lal does not anywhere indicate that the Jewellery and the ornaments from the person of deceased Smt. Gadoli Devi were removed. The prosecution case in this regard appears to be a subsequent development. The witness produced by the prosecution are not the eyewitnesses of the occurrence of loot also as we have already observed above that none of the witnesses had seen the actual occurrence.

To our mind the charge under Section 394 and 397 I.P.C. against the appellants is not proved beyond reasonable doubt.

As far as the charge under Section 120-B I.P.C. against the appellants is concerned, the prosecution has also not adduced any evidence with regard to the conspiracy. Merely on this evidence that the appellants had been sitting in the shop of the appellant Jai Lal in the evening of 23.10.1990, will not constitute the offence under Section 120-B against them.

The circumstances, looming large in the background, inevitably leads to the conclusion that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion.

We are of the view that the prosecution has utterly failed in establishing the guilt of the appellants.

For the reasons stated above we come to the conclusion that the impugned judgment and order passed by the court below is liable to be set aside.

Accordingly the appeal is allowed. The order dated 26.06.1991 passed by the Sessions Judge, Chamili in S.T. No. 10 of 1991 State Vs Madan Lal & others convicting the appellants under Sections 120-B/302/34 I.P.C. as well as under Sections 394/397 I.P.C. and sentencing them for life imprisonment and further sentencing thereon for 10 years R.I. respectively is herby set aside.

The record reveals that the appellants are in jail; hence, they shall be released forthwith unless wanted in any other case.

(B.C. Kandpal, J.) **(M.M. Ghildiyal, J.)**

October 1, 2004
ASWAL